

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In Re Application of

ELLIS THOMPSON CORPORATION

For Facilities in the Domestic Public Cellular  
Radio Telecommunications Service on  
Frequency Block A in Market No. 134,  
Atlantic City, New Jersey

CC DOCKET NO. 94-136

File No. 14261-CL-P-134-A-86

DOCKET FILE COPY ORIGINAL

To: The Commission

**JOINT REQUEST FOR ACCELERATION OF EFFECTIVE DATE**

The Wireless Telecommunications Bureau ("Bureau"), Ellis Thompson Corporation ("ETC"), American Cellular Network Corp. d/b/a Comcast Cellular ("Amcell") and Telephone and Data Systems, Inc. ("TDS") (collectively, the "Parties"), by their attorneys and pursuant to Sections 1.103(a) and 1.276(d) of the Rules, hereby respectfully request that the Summary Decision of Administrative Law Judge Joseph Chachkin, FCC 95D-14, released November 14, 1995<sup>1</sup> ("Summary Decision"), in the above-captioned proceeding be made effective immediately. In support hereof, the following is respectfully shown:

<sup>1</sup> The Summary Decision bears a release date of November 14, 1995, but because the Commission was closed during the week of November 13, the decision was not released until November 20, 1995. See Public Notice, Notice of Change of Release Date, released November 20, 1995.

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## **I. BACKGROUND**

On November 28, 1994, following a remand from the United States Court of Appeals for the District of Columbia Circuit,<sup>2</sup> the application of ETC, which had been granted in June of 1988,<sup>3</sup> was designated for hearing and ETC's grant was rescinded. Ellis Thompson Corporation, 9 FCC Rcd 7138 (1994) ("Hearing Designation Order"). The sole issue for determination was whether at all times during the nine-year prosecution of the application (including the seven year term where ETC was an operating licensee) ETC's owner, Ellis Thompson,<sup>4</sup> remained the real-party-in-interest. On November 14, 1995, Administrative Law Judge Chachkin issued the Summary Decision resolving the designated issue in favor of ETC.

In the normal course of events, the Summary Decision will become effective on January 9, 1996, i.e. 50 days after its November 20, 1995 official release, provided that no party files timely exceptions and the Commission does not elect to reconsider the matter on its own motion. 47 C.F.R. § 1.276(d). At that time, ETC's authorization will return to granted status. Summary Decision at 9. As shown below, good cause exists to accelerate the effective date of the Summary Decision, to be effective as soon as possible, in order to avoid any collateral adverse effect from auction legislation currently under consideration in the Congress.

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<sup>2</sup> Telephone and Data Systems, Inc. v. FCC, 19 F.3d 43 (D.C. Cir. 1994).

<sup>3</sup> Ellis Thompson, 3 FCC Rcd 3962 (Mobile Serv. Div. 1988).

<sup>4</sup> Mr. Thompson is the sole shareholder and director of ETC.

## **II. GOOD CAUSE EXISTS FOR THE ACCELERATION OF THE EFFECTIVE DATE OF THE SUMMARY DECISION**

Both Sections 1.276(d) and 1.103(a) of the Commission's Rules provide that the Commission may alter the normal 50 day period for effectiveness of initial decisions such as the Summary Decision. Section 1.276(d) provides that a summary decision<sup>5</sup> becomes effective 50 days after its release (provided that no party files timely exceptions and that the Commission does not reconsider the matter on its own motion), "unless otherwise ordered by the Commission." 47 C.F.R. § 1.276(d).<sup>6</sup> Section 1.103(a) provides that, in general, Commission actions are effective upon public notice,<sup>7</sup> but that the "Commission may, on its own motion or on motion by any party, designate an effective date that it is either earlier or later in time than the date of public notice of such action." 47 C.F.R. § 1.103(a). Section 1.103 was promulgated by Memorandum Opinion and Order, 49 RR 2d 225 (1981) ("MO&O"). The MO&O notes that "the Commission has broad discretion to designate the effective dates of its actions" and advises that "any party preferring to have an immediate effective date is urged to file a timely motion" to that effect. Id. at 226-27.

This request is being made out of an abundance of caution in light of certain language expanding the Commission's auction authority contained in the Seven-Year Balanced Budget Reconciliation Act of 1995 (the "Budget Act"), which President Clinton vetoed on December 6, 1995. The spectrum auctions provision, which may survive in any new budget bill ultimately

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<sup>5</sup> Section 1.276 refers to initial decisions, but summary decisions are treated as initial decisions for purposes of determining effective date. See 47 C.F.R. § 1.251(e).

<sup>6</sup> See Marshfield B/casting Co., 40 RR 2d (1977) (granting a petition requesting immediate effectiveness of a summary decision pursuant to Section 1.276(d)).

<sup>7</sup> Section 1.276(e) of the Rules provides that once a summary decision becomes effective, "a 'Public Notice' thereof shall be given by the Commission." 47 C.F.R. § 1.276(e).

adopted, expands the Commission's auction authority in a manner which could potentially subject the above-captioned application to competitive bidding. Given the tortuous history of this proceeding and the complicated multi-party settlement of litigation which rests upon the Summary Decision, it is essential that the risk of derailing the Summary Decision in such an unintended manner be eliminated. Mr. Thompson's authorization was first granted in 1988, and the Atlantic City system has been operating for six and a half years. With eleven sites,<sup>8</sup> more than 10,000 customers,<sup>9</sup> and carrying debt of approximately \$3,000,000,<sup>10</sup> the retroactive imposition of competitive bidding to an authorization for such an operating system would work an enormous injustice on Mr. Thompson, ETC and the other private parties to the proceeding.

Section 3001(a)(1)(A) of the Budget Act would amend Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j), to require that the Commission use competitive bidding to award licenses for which it has accepted mutually exclusive applications. Although seemingly redundant, Section 3001(a)(1)(A)(2), provides in pertinent part that: "The competitive bidding authority granted by this subsection shall not apply to licenses . . . that . . . are not mutually exclusive."<sup>11</sup> The possibility exists that, if the Budget Act language is enacted prior to the effective date of the Summary Decision, it may be construed to require the Commission to subject the license for the Atlantic City system to competitive bidding. Such a

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<sup>8</sup> Summary Decision at 1.

<sup>9</sup> Id.

<sup>10</sup> Id. at 8.

<sup>11</sup> It is unknown what the Congress intended by creating an exemption for non-mutually exclusive applications since the competitive bidding requirement, on its face, was only to apply to mutually exclusive applications. Furthermore, whether or not ETC's application is "mutually exclusive" within the intent of Congress is subject to interpretation.

construction of the statute would defy common sense, given that this case involves a cellular MSA license originally granted over seven years before its enactment. This is plainly a result which the parties -- and the Commission -- would wish to avoid.

The 1988 Mobile Services Division Order granting Ellis Thompson's authorization also dismissed all other applicants for the market.<sup>12</sup> When the Hearing Designation Order returned ETC's grant to application status pending the outcome of the proceeding, only one entity claiming to be a dismissed applicant even attempted to intervene, and that attempt at intervention was repeatedly denied.<sup>13</sup> Thus, while there technically are applications which may be mutually exclusive with ETC's pending the effectiveness of the Summary Decision, none of those applicants is a party to the Summary Decision or to the relief requested here.

The unintended application of expanded auction authority to the Atlantic City authorization would work an enormous injustice, particularly in the case of a licensee whose qualifications have been fully vindicated. To strip Mr. Thompson of his authorization and subject the Atlantic City license to competitive bidding at this juncture would be an incomprehensible and grossly punitive result.

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<sup>12</sup> Ellis Thompson, 3 FCC Rcd at 3964 ¶ 23 ("IT IS FURTHER ORDERED That all other non-wireline applicants in this market ARE HEREBY DISMISSED.").

<sup>13</sup> An entity called Ameritel sought to intervene in the hearing proceeding, claiming to be the successor-in-interest to Ameritel, Inc., the fifth-ranked losing applicant in the 1986 lottery that awarded the Atlantic City authorization to ETC. The Presiding Judge denied Ameritel's intervention request, finding that Ameritel had not, in fact, demonstrated that it was the successor entity to Ameritel, Inc. Both the Review Board and the Commission affirmed. Ameritel has now appealed the denial of its intervention to the U.S. Court of Appeals for the D.C. Circuit. Ameritel v. FCC, No. 95-1575 (D.C. Cir. filed November 15, 1995).

Accordingly, the parties respectfully request that the Commission render the Summary Decision effective immediately. This would make ETC's grant effective and thus clearly beyond the potential scope of the most recently proposed amendment to the Commission's auction authority.

Having unanimously supported grant of the Summary Decision, none of the Parties intends to file exceptions to the Summary Decision. Ameritel, which has been denied party status in three separate decisions, which are fully effective, has no right to file exceptions.<sup>14</sup> Thus, no party will be prejudiced by the requested relief,<sup>15</sup> and the public interest will be served by avoiding the litigation that might ensue from an unintended application of the provision in question. The Commission also has long recognized the public interest in promoting settlements among parties before the agency. See, e.g., 47 C.F.R. § 22.135. Accelerating the effective date here will further that objective among the private parties, who have worked hard to settle protracted litigation before state and federal courts which has previously impacted Commission proceedings.

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<sup>14</sup> See 47 C.F.R. § 1.276(a)(1). See also Boca B/casters, Inc., 9 RR 2d 809 (1967). There, the Commission refused to consider exceptions to an initial decision filed by a nonparty. Id. The nonparty, like Ameritel, had been denied intervention by the Hearing Examiner, and both the Review Board and the Commission had affirmed. At the time that the Commission decided not to consider the exceptions, an appeal of the denial of intervention was pending before the D.C. Circuit, Id. n.2, as is now the case with Ameritel.

<sup>15</sup> Nor will Ameritel be prejudiced in the prosecution of its appeal before the D.C. Circuit: acceleration of the effective date of the Summary Decision will not affect the decision's finality for purposes of appeal. 47 C.F.R. § 1.103(b).

### III. CONCLUSION

For the reasons shown above, the Parties respectfully request that the Commission make the Summary Decision effective immediately, and issue a Public Notice to that effect.

Respectfully submitted,

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December 12, 1995

## **CERTIFICATE OF SERVICE**

I, Jamie C. Whitney, a secretary in the law offices of Gurman, Blask and Freedman, Chartered, do hereby certify that I have on this 12th day of December, 1995, had copies of the foregoing "JOINT REQUEST FOR ACCELERATION OF EFFECTIVE DATE" hand delivered, to the following:

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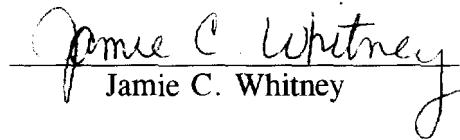
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